

(iii) Section 702(a)(1)(F) of ERISA (29 U.S.C. 1182(a)(1)(F)), section 2705(a)(6) of the Public Health Service Act, and section 9802(a)(1)(F) of the Internal Revenue Code (26 U.S.C. 9802(a)(1)(F)), which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in eligibility and continued eligibility for benefits based on genetic information; or

(iv) Section 702(b)(1) of ERISA (29 U.S.C. 1182(b)(1)), section 2705(b)(1) of the Public Health Service Act, and section 9802(b)(1) of the Internal Revenue Code (26 U.S.C. 9802(b)(1)), as such sections apply with respect to genetic information as a health status-related factor, which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in premium or contribution rates under the plan or coverage based on genetic information.

(2) *Application.* The application of paragraph (b)(1) of this section is intended to prevent Title II causes of action from being asserted regarding matters subject to enforcement under Title I or the other genetics provisions for group coverage in ERISA, the Public Health Service Act, and the Internal Revenue Code. The firewall seeks to ensure that health plan or issuer provisions or actions are addressed and remedied through ERISA, the Public Health Service Act, or the Internal Revenue Code, while actions taken by employers and other GINA Title II covered entities are remedied through GINA Title II. Employers and other GINA Title II covered entities would remain liable for any of their actions that violate Title II, even where those actions involve access to health benefits, because such benefits are within the definition of compensation, terms, conditions, or privileges of employment. For example, an employer that fires an employee because of anticipated high health claims based on genetic information remains subject to liability under Title II. On the other hand, health plan or issuer provisions or actions related to the imposition of a preexisting condition exclusion; a health plan's or issuer's discrimination in health plan eligibility, benefits, or premiums based on genetic informa-

tion; a health plan's or issuer's request that an individual undergo a genetic test; and/or a health plan's or issuer's collection of genetic information remain subject to enforcement under Title I exclusively. For example:

(i) If an employer contracts with a health insurance issuer to request genetic information, the employer has committed a Title II violation. In addition, the issuer may have violated Title I of GINA.

(ii) If an employer directs his employees to undergo mandatory genetic testing in order to be eligible for health benefits, the employer has committed a Title II violation.

(iii) If an employer or union amends a health plan to require an individual to undergo a genetic test, then the employer or union is liable for a violation of Title II. In addition, the health plan's implementation of the requirement may subject the health plan to liability under Title I.

(c) *Relationship to authorities under GINA Title I.* GINA Title II does not prohibit any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan from engaging in any action that is authorized under any provision of law noted in §1635.11(b) of this part, including any implementing regulations noted in §1635.11(b).

(d) *Relationship to HIPAA Privacy Regulations.* This part does not apply to genetic information that is protected health information subject to the regulations issued by the Secretary of Health and Human Services pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

§ 1635.12 Medical information that is not genetic information.

(a) *Medical information about a manifested disease, disorder, or pathological condition.* (1) A covered entity shall not be considered to be in violation of this part based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, even if the disease, disorder,

or pathological condition has or may have a genetic basis or component.

(2) Notwithstanding paragraph (a)(1) of this section, the acquisition, use, and disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition is subject to applicable limitations under sections 103(d)(1)–(4) of the Americans with Disabilities Act (42 U.S.C. 12112(d)(1)–(4)), and regulations at 29 CFR 1630.13, 1630.14, and 1630.16.

(b) *Genetic information related to a manifested disease, disorder, or pathological condition.* Notwithstanding paragraph (a) of this section, genetic information about a manifested disease, disorder, or pathological condition is subject to the requirements and prohibitions in sections 202 through 206 of GINA and §§1635.4 through 1635.9 of this part.

PART 1640—PROCEDURES FOR COORDINATING THE INVESTIGATION OF COMPLAINTS OR CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY SUBJECT TO THE AMERICANS WITH DISABILITIES ACT AND SECTION 504 OF THE REHABILITATION ACT OF 1973

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AUTHORITY: 5 U.S.C. 301; 29 U.S.C. 794(d); 42 U.S.C. 12117(b).

SOURCE: 59 FR 39904, 39908, Aug. 4, 1994, unless otherwise noted.

§ 1640.1 Purpose and application.

(a) This part establishes the procedures to be followed by the Federal agencies responsible for processing and resolving complaints or charges of employment discrimination filed against recipients of Federal financial assistance when jurisdiction exists under both section 504 and title I.

(b) This part also repeats the provisions established by 28 CFR 35.171 for determining which Federal agency shall process and resolve complaints or charges of employment discrimination:

(1) That fall within the overlapping jurisdiction of titles I and II (but are not covered by section 504); and

(2) That are covered by title II, but not title I (whether or not they are also covered by section 504).

(c) This part also describes the procedures to be followed when a complaint or charge arising solely under section 504 or title I is filed with a section 504 agency or the EEOC.

(d) This part does not apply to complaints or charges against Federal contractors under section 503 of the Rehabilitation Act.

(e) This part does not create rights in any person or confer agency jurisdiction not created or conferred by the ADA or section 504 over any complaint or charge.

§ 1640.2 Definitions.

As used in this part, the term:

Americans with Disabilities Act of 1990 or *ADA* means the Americans with Disabilities Act of 1990 (Pub. L. 101–336, 104 Stat. 327, 42 U.S.C. 12101–12213 and 47 U.S.C. 225 and 611).

Assistant Attorney General refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her designee.

Chairman of the Equal Employment Opportunity Commission refers to the Chairman of the United States Equal Employment Opportunity Commission, or his or her designee.

Civil Rights Division means the Civil Rights Division of the United States Department of Justice.

Designated agency means any one of the eight agencies designated under